[HIGH COURT OF AUSTRALIA.]

ARTHUR LONSDALE LEE . . . . APPELLANT;
PLAINTIFF,

AND

WILSON AND MACKINNON . . . . RESPONDENTS.
DEFENDANTS,

CLIFFORD LEE . . . . . APPELLANT;
PLAINTIFF,

AND

WILSON AND MACKINNON . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1934.

MELBOURNE, *Oct.* 23, 24.

SYDNEY, *Dec.* 19.

Starke, Dixon, Evatt and McTiernan JJ.

Defamation—Libel in newspaper—Publication—Description of defamed person applicable to several—Action by some to whom description applicable.

If defamatory words, capable of relating to more than one person, are found actually to disparage each of them among the respective groups of the community which know them, because the words are reasonably understood to refer to each of them, then they may all maintain actions, and this notwithstanding that the writer or publisher intended to refer to still another person to whom his words were also capable of referring.

Decision of the Supreme Court of Victoria (Full Court): *A. L. Lee* v. *Wilson and Mackinnon*; *C. Lee* v. *Wilson and Mackinnon*, (1934) V.L.R. 198, reversed.

APPEALS from the Supreme Court of Victoria.

Arthur Lonsdale Lee and Clifford Lee each brought an action for defamation in the County Court at Melbourne against Messrs. Wilson and Mackinnon, the proprietors and publishers of a daily newspaper called "The Star."

By his particulars of demand each of the plaintiffs alleged (*inter alia*) that in the issue of such newspaper for 31st October 1933, the defendants falsely and maliciously printed and published of and concerning each of the plaintiffs, and of and concerning each of them in the way of their calling, the following words :—

"PENTRIDGE PRISONER'S GRAVE CHARGE.

ALLEGED PAYMENT TO POLICE.

Evidence of the payment of money to one member of the Police Force for transmission to another" (meaning the plaintiff) "was given to-day by John Francis Kelly, a long-term Pentridge Prisoner, to the Police Inquiry at its second session in Pentridge Gaol. . . . Cross-examined further Kelly said . . . he rang Detective Ethell who told him that he would be able to do nothing for him. Ethell said that he thought that Detective Lee" (meaning the plaintiff) "had the matter in his hands.

IT WILL COST YOU £35.

'I have seen Lee' (meaning the plaintiff) 'and it will cost you £35' said Ethell later. Kelly said that he agreed to this.

Lee" (meaning the plaintiff) "replied that the Police were finished with it. Campbell, Kelly said, had a talk with Lee" (meaning the plaintiff) "as a result of which Kelly was handed a cheque for £132 2s. The money, Kelly continued, was distributed to its proper sources and he handed Ethell £35 saying 'Here is the money for Mr. Lee'" (meaning the plaintiff).

"Mr. Smith: Did you hear from Ethell or Lee" (meaning the plaintiff) "what was done with that £35?

Kelly: No.

'Subsequently I saw Ethell who said Lee' (meaning the plaintiff) 'was handling the inquiry' said Kelly. 'Next morning he told me Lee' (meaning the plaintiff) 'would fix it up. Ethell told me Lee' (meaning the plaintiff) 'wanted £10.' Kelly told Mr. Smith that

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he had paid £10 subsequently—two £5 notes—to Ethell for transmission to Lee " (meaning the plaintiff).

Each of the plaintiffs alleged that by these words and by their publication the defendants meant, and were understood to mean, that each of the plaintiffs had accepted a bribe in the execution of his duty, and had been guilty of a criminal offence.

The plaintiff A. L. Lee held the rank of senior constable in the police force; and the plaintiff Clifford Lee held the rank of first constable. Under the regulations relating to the police force in Victoria there is no rank of detective, but each of the plaintiffs was attached to the Criminal Investigation Branch, and had been provided with a badge and a certificate of authority as a detective, and each bore the usual style or title of " detective."

From the evidence given at the trial it appeared that there was a third member of the police force named Lee, and that he held the rank of first constable, and was attached to the Motor Registration Branch of the force, though he was not a detective or known as such, or attached to the Criminal Investigation Branch. At the trial the defendants raised the defence that the substance of the words complained of was given in evidence at the Police Inquiry with respect to such First Constable Lee of the Motor Registration Branch, and that the words were published of and concerning such person and not either of the plaintiffs, and that the words complained of were not intended to refer to either of the plaintiffs.

Each of the plaintiffs called evidence which showed that his own acquaintances understood the words complained of as referring to him. One of the defendants' witnesses, Gordon Williams, was asked by counsel for the defendants the question :—" During the course of the inquiry did you hear counsel and witnesses refer to that man who is in fact First Constable Lee of the Motor Registration Branch as ' Detective Lee ' ? " The question was objected to and disallowed. The actions, by consent, were heard together, and the County Court Judge gave judgment in each case for the plaintiff for £50 damages with costs.

From this judgment the defendants appealed to the Full Court of Victoria, which reversed the decision of the County Court on the grounds that it was open to the defendants to escape liability by

showing that in the circumstances the words on their proper construction were not published of and concerning the plaintiffs, but referred to another person, and that the evidence of the witness, Gordon Williams, was wrongly rejected (*A. L. Lee* v. *Wilson and Mackinnon*; *C. Lee* v. *Wilson and Mackinnon* (1)).

From that decision the plaintiffs now, by special leave, appealed to the High Court.

Coppel (with him *Mulvany*), for each of the appellants. The report contained in the newspaper was not a fair and accurate report of the proceedings, even if the Commission of inquiry was privileged. First, it is immaterial to whom the defendants intended to refer, and the sole question is whether this libel is reasonably understood to refer to the plaintiffs. Secondly, if *E. Hulton & Co.* v. *Jones* (2) decides that it is a defence to show that there is an existing person, and that the words complained of are true of him, no such defence was taken in this case, and there is no evidence to support a finding on such an issue. Thirdly, whatever be the correct view of the law, rejection of the evidence on which the Full Court granted a new trial was correct, and even if incorrect, could not have afforded any defence to the action. On the first point, the real question in *Jones* v. *E. Hulton & Co.* (3), where the facts are narrated, was whether the direction by *Channell* J. to the jury was correct or not, and that direction is quoted by Lord *Loreburn* L.C. (4). In the House of Lords two sets of reasons were delivered, and both sets of reasons support the first proposition above stated. In fact, in the present case, the defendants have defamed and have hit each of the plaintiffs.

[EVATT J. referred to *Peck* v. *Tribune Co.* (5).]

If defamatory statements are published, the publisher must particularize the object of his attack, otherwise he may be sued by various persons.

[MCTIERNAN J. referred to *Capital and Counties Bank* v. *Henty* (6); *Pollock* on *Torts*, 13th ed. (1929), pp. 258, 259.]

(1) (1934) V.L.R. 198.
(2) (1910) A.C. 20.
(3) (1909) 2 K.B. 444, at p. 446.
(4) (1910) A.C., at p. 24.
(5) (1908) 214 U.S. 185; 53 Law. Ed. 960.
(6) (1882) 7 A.C. 741, at pp. 742, 787.

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The judgments in the House of Lords (1) are entirely inconsistent with the reasons given by the Court of Appeal (2). *E. Hulton & Co.* v. *Jones* (1) was referred to in the following cases, as deciding that it was not necessary to prove an intention to defame the plaintiff, namely, *Cassidy* v. *Daily Mirror Newspapers* (3); *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Ltd.* (4); *Adam* v. *Ward* (5); *Washington Post Co.* v. *Kennedy* (6); *Hanson* v. *Globe Newspaper Co.* (7). Those cases are precisely on all fours with the present case.

[STARKE J. referred to *Harvard Law Review*, (1910) vol. XXIII., p. 218.]

Counsel referred to *Laroque* v. *New York Herald Co.* (8); *David Syme & Co.* v. *Canavan* (9); *Franklin* v. *Daily Mirror Newspapers Ltd.* (10); *Pollock* on *Torts*, 13th ed. (1929), pp. 258, 259. *Cassidy* v. *Daily Mirror Newspapers* (11) is commented on in the *Law Quarterly Review*, (1930) vol. XLVI., pp. 1, 2. It is the fact of defamation and not the intention of the publisher that is important.

[EVATT J. referred to *Cunningham* v. *Ryan* (12).]

The only facts which the plaintiff has to prove are that the defendant published the libel, and that the libel referred to the plaintiff. That gives a right of action to the plaintiff, and also a right of action to all others to whom the libel can refer. The only intention that it is necessary to prove is an intention to publish the libel, and intention is immaterial so far as the rights of the plaintiff are concerned. The idea of intention should be discarded from the law of libel altogether, except the intention to publish. The judgment of the Supreme Court should be set aside, and the judgment of the County Court restored.

Lewis (with him *Burgess*), for the respondents. The words were not published of or concerning the plaintiffs. There are two classes of case. The first is of the type of *E. Hulton & Co.* v. *Jones* (1). There, if a person, on the evidence, is found by the jury not to have been speaking of a type, but of an existing person, and if the defendant cannot show that the words are spoken of an existing person, then the defendant is liable to any person that the words fit. The

(1) (1910) A.C. 20.
(2) (1909) 2 K.B. 444.
(3) (1929) 2 K.B. 331, at pp. 341, 348, 349, 352, 354.
(4) (1934) 50 T.L.R. 581, at pp. 582, 583.
(5) (1917) A.C. 309, at pp. 325, 326.
(6) (1925) 41 Am.L.R. 483.
(7) (1893) 159 Mass. 293.
(8) (1917) 220 N.Y. 632.
(9) (1918) 25 C.L.R. 234.
(10) (1933) W.N. 187.
(11) (1929) 2 K.B. 331.
(12) (1919) 27 C.L.R. 294, at p. 313.

other class is where words are published of an existing person, and not of a type or fictitious person ; then if the jury find that the words are published of that existing person, it has never been decided by any English Court that any other person has a cause of action for libel. If in fact defamatory words refer to a real person, then that person alone can recover, and no other persons can do so, although they can show that some persons believed the libel referred to them. The defendant would be entitled to give evidence that the words were intended to refer to a specific person, and the plaintiff would be entitled to give evidence that they referred to himself and not to that other person, and the jury would have to decide what person was referred to, and only one person could recover ; but if the words were spoken of a fictitious person, then any person whom they fit could recover. It is still a material allegation that the words are spoken " of and concerning the plaintiff." The private intentions of the publisher have nothing to do with the case, except where the intention is, as shown by his words, to use them " of and concerning " a specific person. It then becomes of the greatest importance (*Jones* v. *E. Hulton & Co.* (1)). The jury must then decide whether a real or a fictitious person is referred to. If the jury find that the words are not spoken of a fictitious person, they must next say whether it is spoken of the plaintiff or not, but in such case only one plaintiff can succeed. Words referable to one person only give a cause of action to that person only, but more than one person can recover if the defence is that the words refer to a fictitious person. This principle does not apply if the defence is that the words refer to a real person. In the latter case only the intention of the publisher is important (*Godhard* v. *James Inglis & Co.* (2) ; *Shaw* v. *London Express Newspaper Ltd.* (3)). It is still a question of intention, but that intention is one imputed from the surrounding circumstances.

[McTiernan J. referred to *Best* on *Evidence*, 12th ed. (1922), p. 435, and *Daines* v. *Hartley* (4).]

D. C. Thomson & Co. v. *McNulty* (5) draws the distinction above indicated.

[Dixon J. referred to *Spiers & Pond Ltd.* v. " *John Bull* " *Ltd.* (6).]

(1) (1909) 2 K.B., at pp. 479, 480.
(2) (1904) 2 C.L.R. 78, at p. 87.
(3) (1925) 41 T.L.R. 475.
(4) (1848) 3 Ex. 200 ; 154 E.R. 815.
(5) (1927) 71 Sol. Jo. 744.
(6) (1916) 85 L.J. K.B. 992.

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When the only question is one of definition, intention is not of importance. When it is a question of identity, intention is important.

Coppel, in reply.

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered :—

STARKE J. The appellants each brought an action for libel against the respondents, who are the proprietors and publishers of an evening newspaper known as "The Star." The words complained of were contained in the report of evidence given at a Board of Inquiry concerning some allegations affecting the police force of Victoria. They were as follows :—

"PENTRIDGE PRISONER'S GRAVE CHARGE

ALLEGED PAYMENT TO POLICE.

Evidence of the payment of money to one member of the Police Force for transmission to another was given to-day by John Francis Kelly, a long-term Pentridge prisoner, to the Police Inquiry at its second session in Pentridge Gaol. . . . Cross-examined further, Kelly said . . . he rang Detective Ethell, who told him that he would be able to do nothing for him. Ethell said he thought that Detective Lee had the matter in his hands.

IT WILL COST YOU £35.

'I have seen Lee and it will cost you £35' said Ethell later. Kelly said that he agreed to this. Lee replied that the police were finished with it. Campbell, Kelly said, had a talk with Lee, as the result of which Kelly was handed a cheque for £132 2s. The money Kelly continued, was distributed to its proper sources, and he handed Ethell £35, saying 'Here is the money for Mr. Lee.'

Mr. Smith : Did you hear from Ethell or Lee what was done with that £35 ?

Kelly : No. . . .

'Subsequently I saw Ethell, who said Lee was handling the inquiry' said Kelly. 'Next morning he told me Lee would fix it up. Ethell told me Lee wanted £10.' . . . Kelly told Mr. Smith that he had paid £10 subsequently—two £5 notes—to Ethell for transmission to Lee."

It was alleged that the words meant that each of the plaintiffs had accepted a bribe in the execution of his duty as a police officer, and had been guilty of a criminal offence. The publication of the words was proved. It was also proved that Kelly, in his evidence before the Board, had said "First Constable Lee of the Motor Registration Branch" and not "Detective Lee"—a mistake had been made by a reporter on the newspaper in transcribing his shorthand notes—though Kelly did use the word "detective" at a later stage, in referring to this constable. It so happened that there were three officers named Lee in the police force of Victoria: the appellant A. L. Lee, whose rank was that of senior constable, and who was attached to the Criminal Investigation Branch and known as Detective Lee; the appellant Clifford Lee, whose rank was that of first constable, and who was also attached to the Criminal Investigation Branch and known as Detective Lee; and a third officer, who held the rank of first constable, but was attached to the Motor Registration Branch, and was not a detective officer.

The actions for libel brought by Detectives A. L. and Clifford Lee were heard together in the County Court. Evidence was led by each appellant to show that people who knew him and his position in the police force understood the words in a sense defamatory of him. Judgment was entered for each appellant for £50. On an appeal to the Supreme Court of Victoria the judgment was set aside and a new trial ordered. It appeared that during the trial the defendant sought to establish that, in the course of the police inquiry, counsel and witnesses referred to First Constable Lee of the Motor Registration Branch as Detective Lee, but the evidence was rejected. The learned Judges of the Supreme Court were of opinion that this evidence was admissible, because it is necessary to prove in an action for libel that the words were written "of and concerning the plaintiff," that is, that the words were aimed at or intended to refer to the plaintiff. Whether that conclusion is right or wrong depends upon the principle underlying the decision of the House of Lords in *E. Hulton & Co.* v. *Jones* (1). But it is desirable in the first place to refer to the judgment of *Farwell* L.J. in the same case when it was before the Court of Appeal (2), for the learned Judges of the

(1) (1910) A.C. 20.

(2) (1909) 2 K.B., at p. 476.

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Supreme Court rely upon that judgment, and also upon the fact that its terms were substantially approved in the House of Lords by two of the noble and learned Lords. The judgment of *Farwell* L.J. recognizes, I think, that the element of intention is essential to an action of defamation (1). But the gist of the judgment is in the following passage (2): "So the intention to libel the plaintiff may be proved not only when the defendant knows and intends to injure the individuals, but also when he has made a statement concerning a man by a description by which the plaintiff is recognized by his associates, if the description is made recklessly, careless whether it hold up the plaintiff to contempt and ridicule or not." Intent may be real, or imputed. "The libeller is not liable to the plaintiff unless it is proved that the libel was aimed at or intended to hit him; *the manner of proof being such as I have already stated*" (1). "It always was and is still open to him to prove the surrounding circumstances, so as to show that, although the words appear to refer to the plaintiff, that is not their true intent and meaning" (3). An illustration is given at page 481: "If the libel was true of another person and honestly aimed at and intended for him, and not for the plaintiff, the latter has no cause of action, although all his friends and acquaintances may fit the cap on him." Intent, as I understand the learned Lord Justice, should not in such a case be imputed to the defendant. In the Court of Appeal there was some divergence between the judgments of *Fletcher Moulton* L.J. and *Farwell* L.J., but it is merely, I think, that the former required a real intention, to found liability for defamation, whereas the latter was of opinion that the intention might be imputed as well as real. It does not appear to me that the decision of the House of Lords denies that intent is still necessary in actions of defamation, and the view of *Farwell* L.J. is accepted, that intent may be imputed as well as real. Indeed, the Lord Chancellor observed:—"Just as the defendant could not excuse himself from malice by proving that he wrote it in the most benevolent spirit, so he cannot show that the libel was not of and concerning the plaintiff by proving that he never heard

(1) (1909) 2 K.B., at p. 481. (2) (1909) 2 K.B., at pp. 480, 481.
(3) (1909) 2 K.B., at p. 479.

of the plaintiff. His intention in both respects equally is inferred " (1). But, in my opinion, the decision propounds the rule of law that intent to defame should be imputed to a defendant if he uses " language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it." In line with this view is the judgment of *Scrutton* L.J. in *Cassidy* v. *Daily Mirror Newspapers* (2): " I agree with the view expressed *arguendo* by Sir *Montague Smith* in the case of *Simmons* v. *Mitchell* (3): ' The Judge must decide if the words are reasonably capable of two meanings; if he so decide, the jury must determine which of the two meanings was intended '; and by ' intended ' I understand that a man is liable for the reasonable inferences to be drawn from the words he used, whether he foresaw them or not." " If he publishes words reasonably capable of being read as relating directly or indirectly to A, and, to those who know the facts about A, capable of a defamatory meaning, he must take the consequences of the defamatory inferences reasonably drawn from his words." (See also *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Co.* (4).) *Russell* L.J., now Lord *Russell of Killowen*, in *Cassidy's Case* (5), thus states the result of the decision in *E. Hulton & Co.* v. *Jones* (6): " Liability for libel does not depend on the intention of the defamer, but on the fact of defamation." This statement is accurate enough for practical purposes, but is perhaps open to verbal criticism as a statement of legal principle. The judgment of *Farwell* L.J. left the imputation of intent dependent in some degree upon proof, whereas the rule adopted in the House of Lords is definite and rigid in its terms.

Reference was made to *D. C. Thomson & Co.* v. *McNulty* (7) and *Shaw* v. *London Express Newspaper Ltd.* (8). In the former case the question was whether the respondent in the appeal had alleged a relevant case for trial. It was held that she had, and some observations of Lord *Dunedin* were referred to, in which he said that the respondent's case might be torn to pieces at the trial, and that it might be shown that the article could not possibly relate to the respondent, or that

(1) (1910) A.C., at p. 24.
(2) (1929) 2 K.B., at pp. 339, 341.
(3) (1880) 6 App. Cas. 156, 158.
(4) (1934) 50 T.L.R. 581.
(5) (1909) 2 K.B., at p. 354.
(6) (1910) A.C. 20.
(7) (1927) 71 Sol. Jo. 744.
(8) (1925) 41 T.L.R. 475.

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it related to a person who was not the respondent. But the context makes it clear enough that the noble and learned Lord was only dealing with the possible effect of evidence that might be adduced at the trial, and in no wise with any propositions of law involved in the decision of *E. Hulton & Co.* v. *Jones* (1). In *Shaw's Case* (2) the trial Judge was not satisfied that the statement complained of was reasonably capable of a meaning defamatory of the plaintiff, but such a decision only means that a reasonable man could not, in the circumstances of that case, construe the words complained of in a sense unfavourable to the plaintiff.

Lastly I would add that that plaintiffs in this action should succeed, even if the reasoning of *Farwell* L.J. were applied to the case. The defendant's reporter took down the evidence in shorthand correctly; but carelessly, and without any consideration of the effect of the alteration, he altered " First Constable Lee " to " Detective Lee "—possibly because the statement then appeared more sensational. The decision in the House of Lords, however, puts the liability of the defendant beyond doubt. And, upon the rule established by that decision, there is no reason why two or more persons who correspond to the description " Detective Lee," and who produce evidence from their acquaintances or others similar to that produced in the present case, should not recover.

The result is that the appeals should be allowed, and the judgment of the County Court restored.

DIXON J. The respondents are proprietors of a newspaper which, in the course of a report of the proceedings at an inquiry conducted by a Police Magistrate into the administration of the Motor Registration Branch of the Victorian Police Department, gave an abstract of some evidence defamatory of a person it described as " Detective Lee."

The appellants are two detectives in the Victorian Police Force stationed at Melbourne, one of whom is named Arthur Lonsdale Lee, and the other Clifford Lee, and each of whom is commonly called " Detective Lee." Each sued the respondents for libel, and each recovered damages. It appears that neither was the person intended

(1) (1910) A.C. 20. (2) (1925) 41 T.L.R. 475.

to be referred to by the witness whose evidence the newspaper purported to report. That person was a first constable named Lee, serving in the Motor Registration Branch.

On behalf of the respondents evidence was tendered at the trial which might have shown that in some quarters, and, at any rate at the inquiry, this first constable was known as "Detective Lee," although he strictly was not entitled to that description. This evidence was rejected. On appeal, the Supreme Court ordered a new trial of both actions, on the ground that it would be a defence to the action to show that the alleged libel referred to another person who actually existed, and was aptly or sufficiently described or identified by the words complained of: a defence to which the rejected evidence was relevant.

This appeal from that order raises for our decision the substantial question whether, in an action of libel by a plaintiff who corresponds to the description contained in the defamatory matter published by the defendant, and who has been indentified with the description by readers knowing him, it is a defence that in fact there is another person who also sufficiently corresponds to the description, and who is actually the person intended to be referred to by the author of the libel, or by the defendant who published it. The decision of this question appears to me to depend upon the degree to which, under the influence of the judgment in *E. Hulton & Co.* v. *Jones* (1), liability for libel has come to depend upon the actual operation of the words published as a disparagement of the plaintiff's reputation. It is the publication, not the composition of a libel, which is the actionable wrong. Often the person sued for publishing is not the writer. The injury done by a libel arises from the effect produced upon its readers. These considerations naturally led to a rigorous application to libels of the rule that the meaning of a document should be determined independently of the actual intention which the writer entertained. The acceptance of a criterion of liability which adopted, not the intention actuating the writer, but the understanding produced in the reader, was aided by the rule, which can be traced back to an early time, that for the interpretation of a libel evidence could be received of particular circumstances affecting

(1) (1910) A.C. 20; (1909) 2 K.B. 444.

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its meaning, and of the actual interpretation which persons conversant with those circumstances affixed to it. But in all documents a marked distinction exists between ascertaining what are the ideas conveyed concerning the persons or physical objects referred to, and identifying the persons and objects so referred to. The latter process consists in correctly associating an existing person or thing with a description contained in the document. Where the description or means of identification consists in or includes proper names, it must often be the case that more than one person can be found to answer it. If the document must have a legal effect on one only of these persons, no means exists of determining to which it refers, except by an inquiry into the contents of the writer's mind. But until two or more are found who do answer the description, or to whom it applies indifferently or in an equal degree, no occasion arises for such an inquiry. *Ubi in verbis nulla ambiguitas, ibi nulla occurrit voluntatis quæstio.* The cause of action consists in publication of the defamatory matter of and concerning the plaintiff. It might be thought, therefore, that, in any event, this warranted or required some investigation of the actual intention of the publisher. But his liability depends upon mere communication of the defamatory matter to a third person. The communication may be quite unintentional, and the publisher may be unaware of the defamatory matter. If, however, the publication is made in the ordinary exercise of some business or calling, such as that of booksellers, newsvendors, messengers, or letter carriers, and the defendant neither knows nor suspects, nor using reasonable diligence ought to know or suspect the defamatory contents of the writing, proof of which facts lies upon him, his act does not amount to publication of a libel. It is scarcely consistent with this doctrine to look for the publisher's actual intention, even for the purpose of applying the libel to one to the exclusion of another or other persons, either of whom the description it contains would effectively denote. If it be necessary to find which, of several equally described, was the person actually meant, the intention of the writer, not of the publisher, would appear to govern the answer. An actual intention, whether in writer or publisher, of referring to the plaintiff cannot be treated as irrelevant. Indeed, where the words are capable of relating to the plaintiff, but

it is uncertain whether they actually do so, the fact that they are used with him in view appears to be decisive. The reason may be that if words are capable of being read as referring to the plaintiff, and are intended to be so read, it must be presumed in his favour that they actually were so read.

The question, which arose for decision in *E. Hulton & Co.* v. *Jones* (1), was whether defamatory matter capable of referring to the plaintiff, and actually understood by many persons to refer to him, constituted a libel upon him, although they were in fact intended by the writer to refer to no existing person, but to relate to an imaginary incident and to a fictitious character, and were capable of being so understood. In giving his reasons for deciding that it did constitute a libel, Lord *Loreburn*, with whom the other Lords concurred, said (2) :—" Libel is a tortious act. What does the tort consist in ? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff. . . . If the intention of the writer be immaterial in considering whether the matter written is defamatory, I do not see why it need be relevant in considering whether it is defamatory of the plaintiff. The writing, according to the old form, must be malicious, and it must be of and concerning the plaintiff. Just as the defendant could not excuse himself from malice by proving that he wrote it in the most benevolent spirit, so he cannot show that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff. His intention in both respects equally is inferred from what he did. His remedy is to abstain from defamatory words."

Lord *Shaw* said (3) :—" In the publication of matter of a libellous character, that is matter which would be libellous if applying to an actual person, the responsibility is as follows : In the first place there is responsibility for the words used being taken to signify

(1) (1910) A.C. 20 ; (1909) 2 K.B. 444.

(2) (1910) A.C., at pp. 23, 24.

(3) (1910) A.C., at p. 26.

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that which readers would reasonably understand by them; in the second place there is responsibility also for the names used being taken to signify those whom the readers would reasonably understand by those names; and in the third place the same principle is applicable to persons unnamed but sufficiently indicated by designation or description."

These passages express the grounds of the decision of the House of Lords, and, in my opinion, they express a test which makes the tort of libel consist in the operation of defamatory matter as an actual disparagement of the plaintiff's reputation. This principle logically applied appears to me to require the conclusion that a description on its face designating one person only may, nevertheless, be a libel of two or more, if, being capable of denoting each of them, it is reasonably understood by one group of people to refer to one of them, and by another group to another and so on. No doubt there was much to be said against the adoption of the principle, but, having been adopted, it gives rise to consequences which may not be avoided. Even if some departure occurred from the older views of the grounds of liability for defamation, it was a development readily arising from the already established rules for ascertaining the meaning of defamatory writings, and determining the liability for their publication, the rules I began by describing. It is true that hitherto two persons have not in fact recovered in respect of defamatory matter purporting to deal with the character or conduct of one person only. But long before *E. Hulton & Co.* v. *Jones* (1), *Holmes* J. had said :—"On general principles of tort, the private intent of the defendant would not exonerate it. It knew that it was publishing statements purporting to be serious, which would be hurtful to a man if applied to him. It knew that it was using as the subject of those statements words which purported to designate a particular man, and would be understood by its readers to designate one. In fact, the words purported to designate, and would be understood by its readers to designate, the plaintiff. If the defendant had supposed that there was no such person, and had intended simply to write an amusing fiction, that would not be a defence, at least unless its belief was justifiable. Without special reason, it would

(1) (1910) A.C. 20.

have no right to assume that there was no one within the sphere of its influence to whom the description answered. . . . So, when the description which points out the plaintiff is supposed by the defendant to point out another man whom in fact it does not describe, the defendant is equally liable as when the description is supposed to point out nobody. On the general principles of tort, the publication is so manifestly detrimental that the defendant publishes it at the peril of being able to justify it in the sense in which the public will understand it. . . . If an article should describe the subject of its statements by two sets of marks, one of which identified one man and one of which identified another, and a part of the public naturally and reasonably were led by the one set to apply the statements to one plaintiff, and another part were led in the same way by the other set to apply them to another, I see no absurdity in allowing two actions to be maintained" (*Hanson* v. *Globe Newspaper Co.* (1)).

In the Court of Appeal in *Jones* v. *E. Hulton & Co.* (2), in the judgment of *Farwell* L.J., this passage occurs :—"It is said that this would enable several plaintiffs to bring several and distinct actions in respect of one libel, and I think that this is so ; but I am unable to see the objection. If the libel consisted in defamation of a number of individuals described generally, that is to say, 'as the owners of some of the Irish factories' as in *Le Fanu* v. *Malcomson* (3), every member of the class who could satisfy the jury that he was a person aimed at and defamed could recover ; and I can see no reason why two or more persons of the name of Artemus Jones who produced evidence from their acquaintances and others in different parts of the kingdom similar to that produced by the plaintiff in this case, the other circumstances being similar, should not recover." Sir *Frederick Pollock*, in his comment upon the decision (*Law of Torts*, 13th ed. (1929), at p. 259, note (*n*)) said : "It seems to follow that if the same words may reasonably be understood by different persons to apply to A., B., C. . . . &c. there is no reason why A., B., C. . . . &c. should not all have simultaneous and independent causes of action."

(1) (1893) 159 Mass., at pp. 301, 302, 305.

(2) (1909) 2 K.B., at p. 481.

(3) (1848) 1 H.L.Cas. 637 ; 9 E.R. 910.

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It is not easy to see what other operation a rule could have which definitely makes the application of the defamatory words to the plaintiff depend upon objective considerations. And such a rule appears to be generally accepted as that established. Lord *Russell*, as he now is, has expressed the law compendiously in the sentence "Liability for libel does not depend on the intention of the defamer; but on the fact of defamation" (*Cassidy* v. *Daily Mirror Newspapers* (1)). *Scrutton* L.J. still more recently stated it to be "the law that though the person who writes and publishes the libel may not intend to libel a particular person and, indeed, has never heard of that particular person, the plaintiff, yet, if evidence is produced that reasonable people knowing some of the circumstances, not necessarily all, would take the libel complained of to relate to the plaintiff, an action for libel will lie" (*Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Ltd.* (2)).

The Judges of the Supreme Court regarded two judicial statements as authorities which permitted, if they did not require, them to give effect to the view that words aimed at an existing person, and capable of designating him, could not be actionable by another or others on the ground that they also fitted him or them. The first is contained in the judgment of *Farwell* L.J. in *Jones* v. *E. Hulton & Co.* (3), a judgment in which Lord *Atkinson* in the House of Lords (4) said he wished to express his substantial concurrence, an observation in which Lord *Gorell* joined (4). The passages containing the statements on which their Honors relied are as follows:—"But it is not enough for a plaintiff in libel to show that the defendant has made a libellous statement, and that the plaintiff's friends and acquaintances understand it to be written of him: he must also show that the defendant printed and published it of him; for if the defendant can prove that it was written truly of another person the plaintiff would fail. To this extent I agree with *Fletcher Moulton* L.J., but we differ as to the meaning of the word 'intended.' In my opinion the defendant intended the natural meaning of his own words in describing the plaintiff as much as in the innuendo: the inquiry is not what did the defendant mean in his own breast, but

(1) (1929) 2 K.B., at p. 354.
(2) (1934) 50 T.L.R., at p. 583.
(3) (1909) 2 K.B., at p. 476.
(4) (1910) A.C., at p. 25.

what did the words mean having regard to the relevant circumstances" (1). Again, "If the libel was true of another person and aimed at and intended for him, and not for the plaintiff, the latter has no cause of action, although all his friends and acquaintances may fit the cap on him. If this were not so, no newspaper could ever venture to publish a true statement of A., lest some other person answering the description should suffer thereby" (2).

Now the first of these passages appears to me to mean no more than that, if, judged altogether apart from the intention of the writer and by reference only to the effect produced by the words, the libel relates to some other person, the plaintiff must fail. It certainly suggests that the libel can be treated as relating to one person alone. The second also suggests that it can relate only to one. Both introduce the qualification of truth, but it is difficult to understand the relevance of the truth of the libel to the issue of and concerning whom it was published. The second passage is immediately followed in the text by the sentence I have already quoted, beginning, "It is said that this would enable several plaintiffs to bring several and distinct actions in respect of one libel, and I think that this is so" (2). There appears to be something wrong in the association of these two passages. They can only be reconciled on the assumption that what would enable several and distinct actions to be brought is the failure to fulfil the conditions that the libel was true of another person and was honestly aimed at him; that, in the absence of truth and honesty in relation to the person actually meant, others could sue as well as he. It may be noticed that the words "aimed at" mean actually intended by the writer to be referred to. This seems inconsistent with the doctrine his Lordship had insisted on, that nothing but the meaning conveyed by the text is to be considered. Again, I am altogether unable to believe that the truth and honesty of the statement made about one man can be a criterion of liability to another whose reputation has actually been adversely affected by words capable of referring to him. I do not think that Lord *Atkinson's* and Lord *Gorell's* approval of the substance of this judgment requires that effect should be given to

(1) (1909) 2 K.B., at p. 480. (2) (1909) 2 K.B., at p. 481.

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these passages. I find great difficulty in understanding the full meaning of pages 480-482 of the report (1).

The other judicial statement relied upon by the Judges of the Supreme Court occurs in a brief report in the *Solicitors' Journal* (2) of a Scotch appeal in the House of Lords: *D. C. Thomson & Co.* v. *McNulty*. According to this report, Lord *Dunedin*, in delivering the judgment, said :—" The appellants published an article relating to the somewhat startling experiences of a young woman, named Elizabeth McNulty, living in Anderston, and aged twenty-three. Those adventures showed that she was guilty of conduct which made her amenable to the law, and it was not denied that the statements were calumnious. The action was brought by Elizabeth McNulty, who lived at Anderston, and whose age was twenty-one. She averred that any person reading the article might reasonably suppose that it referred to her, and that many of her friends thought it did. The question was, whether she was entitled to have an issue approved which would be put before a jury. It was useless for him to say anything on the law of the matter as it had been determined in the case of *E. Hulton & Co.* v. *Jones* (3). He was quite unable to say that there was not here a good case for inquiry. It might be torn to pieces at the trial because it might then be shown that the article could not possibly relate to her, or that it related to a person who was not the respondent, and on that finding the defendant would escape. But as matters stood he had no hesitation in saying that the decision of the majority of the Inner House was right."

The critical words are " or it related to a person who was not the respondent." These words are given in *The Times* newspaper, of 29th July 1927, somewhat differently. There the passage is as follows :—" It might be torn to pieces when the evidence came to be led at the trial, because it might be shown that the pursuer was known to be at Glasgow throughout the relevant period, and that, therefore the article could not possibly relate to her. It might also be possible to show that the article was a true narration of facts relating to a person who was not the pursuer and on that finding the defenders would escape."

(1) (1909) 2 K.B. 444.
(2) (1927) 71 Sol. Jo. 744.
(3) (1910) A.C. 20.

I think that it is unlikely that Lord *Dunedin* meant by these words to express an opinion that, although the words were found actually to reflect upon the plaintiff, the defendant would escape by showing that they also related to some other person of whom they were intended to be written. Such an opinion would not have been conveyed in a mere phrase. That it related to an outstanding question of law of some importance would not have escaped the notice of Lord *Dunedin*, Lord *Sumner* and Lord *Atkinson*. It is much more likely that his Lordship expressed no more than the possibility that it would be found to relate in the estimation of readers to some other person, and not to the plaintiff.

I feel constrained to the conclusion that the law now is that, if defamatory words, capable of relating to more than one person, are found actually to disparage each of them among the respective groups of the community which know them, because the words are reasonably understood to refer to each of them, then they may all maintain actions, and this notwithstanding that the writer or publisher intended to refer to still another person whom his words are also capable of meaning.

For these reasons I think that the appeals should be allowed and the judgments of the County Court restored.

EVATT AND MCTIERNAN JJ. There can be no question that the words " Detective Lee," which were used to describe the person to whom corruption in the execution of his duty was imputed, are capable of referring to each of the appellants ; and in each action evidence was given by persons who knew the plaintiff that they understood the words " Detective Lee " to refer to the plaintiff in such action. And such evidence was accepted and acted upon by the tribunal of fact, i.e. the County Court Judge himself.

The Full Court of the Supreme Court (*Macfarlan*, *Lowe* and *Martin* JJ.) decided that the learned trial Judge was in error in disallowing a question. As to this *Lowe* J. said in his judgment (1) :—

> " Counsel for the defendants informed us that the question tendered was the first of a series of questions designed to lay the foundation of an argument later to be addressed to the learned Judge that in the circumstances the words complained of were intended to refer to First Constable Lee."

(1) (1934) V.L.R., at pp. 208, 209.

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The substantial question for decision is whether the respondents would have established a good defence if they had proved that the words complained of were intended to refer to " First Constable Lee." The respondents rely on the judgment of *Farwell* L.J. in *Jones* v. *E. Hulton & Co.* (1), which, they contended, was approved by the House of Lords (2)). In the Court of Appeal, both *Alverstone* L.C.J. and *Farwell* L.J. rejected the conclusion which was reached by *Fletcher Moulton* L.J., that the liability of a person who is sued for libel depends upon whether he had an actual intention of defaming the plaintiff. But *Farwell* L.J. was of opinion that, although the defendants could not be heard to say that they did not intend to defame the plaintiff, it was open to the defendants, if the words appear to refer to the plaintiff, to prove the surrounding circumstances so as to show that the true intent and meaning of the words is not to refer to the plaintiff. No precise criterion is stated for determining the relevancy of the circumstances which may be inquired into, except in so far as the criterion is comprehended by the term " surrounding circumstances." *Farwell* L.J. mentions certain circumstances which, if proved, might have exculpated the defendants.

> " If the defendants," he says, " had proved in the present case not only that the writer of the article did not know of the plaintiff's existence, but also that there was an Artemus Jones other than the plaintiff, who was present at Dieppe in the company alleged, then the circumstances with reference to which the words ' Artemus Jones ' were used would show that the plaintiff was not the person intended " (3).

Accordingly, the respondents contended that in the present case the surrounding circumstances might show that the true intent and meaning of the words " Detective Lee " was " First Constable Lee." Now the observations of *Farwell* L.J. seem to be limited to cases where there is an intent to make a defamatory imputation against A, and the imputation is proved to be true of A, and there is in fact no intent to refer to the plaintiff. If such is the meaning of *Farwell* L.J. it can have no application here, where it is not alleged or proved that the published imputation was true of First Constable Lee.

Although Lords *Atkinson* and *Gorell* expressed substantial concurrence with the judgment of *Farwell* L.J., they also concurred with

(1) (1909) 2 K.B. 444. (2) (1910) A.C. 20.
(3) (1909) 2 K.B., at pp. 479, 480.

the judgment of Lord *Loreburn* L.C.; and Lord *Shaw of Dunfermline* in a separate judgment agreed with the Lord Chancellor's observations. These two latter judgments contain no recognition of the principle that liability for the publication of defamatory words depends upon what, upon proof of the surrounding circumstances, is discovered to be the true "intent" of the words used to identify the person against whom the imputations are made. Lord *Loreburn* L.C. said (1):—

> "Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff."

Lord *Shaw of Dunfermline* said:—

> "My Lords, with regard to this whole matter I should put my propositions in a threefold form, and, as I am not acquainted by training with a system of jurisprudence in which criminal libel has any share, I desire my observations to be confined to the question of civil responsibility.
>
> In the publication of matter of a libellous character, that is matter which would be libellous if applying to an actual person, the responsibility is as follows: In the first place there is responsibility for the words used being taken to signify that which readers would reasonably understand by them; in the second place there is responsibility also for the names used being taken to signify those whom the readers would reasonably understand by those names; and in the third place the same principle is applicable to persons unnamed but sufficiently indicated by designation or description" (2).

The principle of these two judgments is the objective character of libellous imputations, and has been recognized in such recent cases as *Cassidy* v. *Daily Mirror Newspapers* (3) and *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Ltd.* (4). The same general principle was clearly recognized in 1908 in the judgment of the Supreme Court of the United States, where *Holmes* J. said:—

> "If the publication was libellous the defendant took the risk. As was said of such matters by Lord *Mansfield*, 'Whatever a man publishes, he publishes at his peril.' *R.* v. *Woodfall* (5). . . . The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable

(1) (1910) A.C., at p. 23.
(2) (1910) A.C., at pp. 25, 26.
(3) (1929) 2 K.B. 331, at pp. 353, 354.
(4) (1934) 50 T.L.R. 581, at p. 582.
(5) (1774) Lofft 776, 781; 98 E.R. 914, 916.

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if the statements are false or are true only of someone else " (*Peck* v. *Tribune Co.* (1)).

We are of opinion that the respondents knew, or ought to have known that the publication of the words complained of would injure the reputation of any person whom the readers would reasonably understand to be signified by the name " Detective Lee." As Lord *Blackburn* said :—

> " The question is not whether the defendant intended to convey that imputation ; for if he, without excuse or justification, did what he knew or ought to have known was calculated to injure the plaintiff, he must (at least civilly) be responsible for the consequences, though his object might have been to injure another person than the plaintiff, or though he may have written in levity only " (*Capital and Counties Bank* v. *Henty* (2)).

The judgment in *D. C. Thomson & Co.* v. *McNulty* (3) should not be read as meaning that a defendant may exculpate himself by proving that his published words were not intended by him to refer to the plaintiff, but merely as meaning that a defendant may prove facts relating to the plaintiff, for example, his place of residence, which may convince the tribunal of fact that the plaintiff cannot reasonably be identified with the person of and concerning whom the words complained of were published.

But the evidence which was rejected in the present case was not tendered to prove facts relating to each plaintiff, relevant to the issue whether he could reasonably be understood to be signified by the name " Detective Lee " of whom the libel was published. In our opinion, the rejected evidence raised the immaterial issue whether the published words " Detective Lee " were intended—by the publisher—to refer to First Constable Lee. The respondents cannot be heard to say that the words " Detective Lee " were intended to signify a person whose identity would be revealed, not by the published matter itself, but by proof of surrounding circumstances.

It follows from the now established principles of civil liability for libel, that there is no obstacle to two or more persons succeeding in actions founded on a libel which in its terms refers to one person only. So much was conceded by *Farwell* L.J. in his judgment in *Jones* v. *E. Hulton & Co.* (4), where the publisher's intent was to refer to no

(1) (1908) 214 U.S., at p. 189 ; 53 Law. Ed., at p. 962.
(2) (1882) 7 A.C. 741, at p. 772.
(3) (1927) 71 Sol. Jo. 744.
(4) (1909) 2 K.B. 444.

existing person whatever. The case is a fortiori where, as here, there is an admitted intent to libel some person, but each of several groups of readers reasonably attributes the defamatory imputation to several other persons. The reasonableness of the inference made by each group is, of course, to be determined by the jury. But, in the present case, there is no suggestion that, having regard to the evidence, the Judge acted unreasonably, still less that he should have refrained from hearing the two cases together.

The appeal should, in our opinion, be allowed, the order of the Full Court set aside, and the judgment of the County Court restored.

Appeal allowed with costs. Order of the Supreme Court discharged. Judgment of County Court restored. Respondents to pay costs of appeal to the Supreme Court.

Solicitor for the appellants, *P. J. Ridgeway.*
Solicitors for the respondents, *Blake & Riggall.*

H. D. W.